Supreme Court, U.S.
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No. 91-1781

In The

Supreme Court of the United States

October Term, 1991

STATE OF ALABAMA,

Petitioner,

vs.

SYLVESTER BROOKS,

Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. May a warrant magistrate validly issue a search warrant for unnamed persons when the affidavit and facts presented do not support a finding of probable cause?

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STATUTORY PROVISIONS INVOLVED

The statutory provisions involved and at issue in this case are Sections 15-5-1 through 15-5-5, Code of Alabama (1975). Copies of these statutes are contained in the petitioner's appendix as Appendix D.

STATEMENT OF THE CASE

In this case the Court of Criminal Appeals ruled that the search of the respondent was not proper based on the search warrant. The affidavit upon which the search warrant was issued simply did not provide probable cause to search any person other than Michael Perry who was named in the affidavit and the search warrant. In reaching that conclusion the Court of Criminal Appeals quoted from the case of *Helms v. State*, 549 So. 2d 598 (Ala. Cr. App. 1989). in *Helms*, the court was faced with an affidavit which did not supply probable cause for the issuance of a search warrant authorizing the search of the person of Helms. Also, the search did not follow within the exceptions to the warrant requirement. *Helms v. State*, 549 So. 2d 598, 600.

In the present case, the Court of Criminal Appeals relied on Section 15-5-3, Code of Alabama (1975), which states:

> A search warrant can only be issued on probable cause, supported by an affidavit naming or describing the person and particularly descibing the property and the place to be searched.

The opinion of the Court of Criminal Appeals stated:

> [M]ere presence of unnamed and undescribed persons, where an otherwise valid search warrant is executed, does not allow a search of those persons when probable cause does not exist.

STATEMENT OF FACTS

On October 7, 1989, Melvin Harrison, a detective with the City of Opelika, applied to District Court Judge Richard Lane for a

search warrant. He presented Judge Lane with a packet of pretyped documents which included a diagram, a search warrant and an affidavit in support of the search warrant (R116). The search warrant affidavit read:

> In Lee County, State of Alabama, there is now being concealed certain property, namely cocaine hydrocholoride, a Schedule II drug under the Alabama Uniform Controlled Substances Act, and United States currency which are now being stored, concealed, otherwise hidden 600 South 4th Street, Opelika, Alabama, presently known as JOHN & BO'S FISH SUPREME.
>
> (Here give alleged grounds for search and seizure)

And the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows: "a confidential informant in the past 48 hours has purchased cocaine from a black male known as Mike Perry at JOHN & BO'S FISH SUPREME, 600 South 4th Street, Opelika, Alabama. The money used in the purchase was copied and the serial numbers recorded. The purchase was also monitored and observed by Det. Harrison. The confidential informant used has been proven to be reliable and in the past has aided in the arrest of several persons. JOHN & BO'S FISH SUPREME business license is also under the name of Michael Perry. Det. Harrison checked with Opelika Light and Power and foundthat the power at JOHN & BO'S FISH SUPREME is issued to Michael Perry . . . " (R644). The only other information supplied the judge by Det. Harrison was, "I told him while my confidential informant purchased cocaine, a vehicle drove up with two (2) black females and a black male. My informant was wearing a body mike, and when the two (2) black females and the black male stepped up to

the window, they asked Mr. Perry, also, for a quarter bags, which means cocaine." (R131).

Det. Harrison testified that he personally had typed the search warrant and the supporting affidavit before taking them and presenting them to the judge (R116).

After obtaining the judge's signature on the search warrant, Det. Harrison and other law enforcement officers went to John & Bo's Fish Supreme to execute the search warrant. They entered the premises with weapons drawn and ordered everyone down on the floor with their hands behind their backs (R216).

The three (3) persons inside were placed on the floor, their wallets removed from their pockets and each was handcuffed (R191, 232). Later, during the search, Det. Knight of the Opelika Police Department entered the premises and inquired whether or not the three (3) individuals on the floor had been searched (R279). No contraband had been discovered at that point in time (R192) but Det. Knight proceeded to search all three (3) persons even though he did not know the identity of either (R279). It was at that time that cocaine was alleged to have been found on respondent's person.

REASONS FOR DENYING THE WRIT

This case does not present a situation wherein the Court is faced with *an important novel question; a conflict with constitutional policy as recognized by the Honorable Court; or conflict among the state appellate courts.* This is simply a case where the search warrant affidavit did not provide probable cause to allow the magistrate to issue a search warrant for "any other persons therein." There was no information concerning an ongoing criminal enterprise but there was information that Michael Perry was operating John & Bo's Fish Supreme and that Michael Perry would likely be on the premises and have cocaine on his person. The

Alabama appellate courts made no determination that *Ybarra v. Illinois*, 444 U.S. 85, 62 L. Ed. 2d 238, 100 Sup. Ct. 338 (1979), established a per se rule barring the issuance of warrants to search persons who can be identified only by their presence at a "criminal operation." It only confirmed what this Court observed in *Ybarro*, 100 Sup. Ct. 338, 339:

> When the search warrant was issued the authorities had no probable cause to believe that any person found in the tavern, aside from the bartender would be violating the law.

The search warrant affidavit in the present case named Michael Perry and gave every indication that Mr. Perry had cocaine on his person but did not set forth any facts pertaining to anyone else on the premises. The issuing magistrate signed a search warrant which had been prepared for him by the law enforcement officer and which exceeded the scope of the affidavit which the officer also prepared and presented to the judge.

The State of Alabama in the Petition filed in this matter has developed its argument around the term "original enterprise." The affidavit in support of the search warrant in this case does not reveal even the hint of a criminal enterprise and actually provides only enough information to determine that one person is engaged in or has sold small quantities of cocaine. There was no indication that other people were involved in the sell or that all persons on the premises would likely be engaged in illegal activities. As the Court stated in *Ybarro*, 100 Sup. Ct. 338, 342:

> Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement can not be undercut or avoided by simply pointing to the

> fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

In the instant case, the officers initially seized the respondent, not merely detaining him, as they ordered him onto the floor, handcuffed him and removed his wallet. There was no probable cause to search and seize the respondent at that point in time and no contraband had been located. The Alabama appellate courts merely continued the "probable cause" requirement for search warrants and applied that requirement to the statutory requirement for issuance of search warrants in the State of Alabama. Section 15-5-3, Code of Alabama (1975), requires that:

> A search warrant can only be issued on probable cause, supported by affidavit naming or describing the person and particularly describing the property and the place to be searched.

Had the affidavit in question supplied probable cause for the search of other persons on the premises, the Alabama appellate courts would have upheld the seizure, the search and the subsequent seizure.

CONCLUSION

In conclusion, your respondent Sylvester Brooks respectfully submits that this case is not an appropriate one for the Court to review or for the Court to issue a writ of certiorari.

Respectfully submitted,

SYLVESTER BROOKS
Respondent Pro Se